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No. 96-710

In the Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL J. SULLIVAN, ET AL., PETITIONERS

v.

SYLVESTER SASNETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, is a constitutional exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment.

2. Whether the Religious Freedom Restoration Act of 1993 is consistent with constitutional separation of powers principles.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	4

TABLE OF AUTHORITIES

Case:

City of Boerne v. *Flores*, cert. granted, No. 95-2074 (Oct. 15, 1996) 3

Constitution and statutes:

U.S. Const.:
- Amend. I (Establishment Clause) 3
- Amend. X 3
- Amend. XIV 3
  - § 5 3

Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 101(a), Tit. VIII, 110 Stat. 1321-66 (to be codified at 18 U.S.C. 3626) 3

Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 2, 3

42 U.S.C. 1983 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 91 F.3d 1018. The opinions of the district court (Pet. App. A15-A58, A59-A90) are reported at 908 F. Supp. 1429 and 891 F. Supp. 1305.

JURISDICTION

The decision of the court of appeals was entered on August 2, 1996. The petition for a writ of certiorari was filed on October 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents, who are inmates in the Wisconsin prison system, filed this suit in state court against

Wisconsin prison officials pursuant to the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, and 42 U.S.C. 1983. Pet. App. A15. Respondents allege that two prison procedures violate their rights to religious freedom. One of them, Internal Management Procedure (IMP) DOC 309 #1-D, forbids inmates to wear earrings, necklaces, bracelets, ankle bracelets and pins, including religious jewelry such as crucifixes. The second, DOC 309 IMP #4, prohibits inmates from possessing more than 25 books, magazines, newspapers or periodicals, including religious publications. Pet. App. A23. Respondents contended that these rules substantially burden their free exercise of religion by preventing them from wearing a cross and from owning the number of religious publications they need to pursue their faith.

After petitioners removed this suit to federal court, they moved to dismiss respondents' RFRA claim on the ground that RFRA is unconstitutional. The United States intervened to defend RFRA's constitutionality, and the district court issued a ruling upholding RFRA's constitutionality. Pet. App. A59-A90. The parties then conducted discovery and filed cross-motions for summary judgment. The court granted summary judgment for respondents on their RFRA claim challenging the religious jewelry prohibition. *Id.* at A57. The district court granted summary judgment for petitioners, however, with respect to the rule limiting to 25 the number of publications inmates can possess in their cells. *Ibid.*

Petitioners appealed the grant of summary judgment on the jewelry regulation, and the United States Court of Appeals for the Seventh Circuit affirmed. It held that RFRA is a valid exercise of

Congress's power under Section 5 of the Fourteenth Amendment (Pet. App. A7) and that RFRA does not violate separation of powers or the Establishment Clause (*id.* at A8). The Seventh Circuit also held that the jewelry regulation substantially burdens respondents' religiously motivated need to wear religious jewelry (*id.* at A9) and that petitioners did not prove that the jewelry regulation is the "least restrictive means" to achieve their compelling interests in prison safety and security (*id.* at A3, A9).[1]

ARGUMENT

This Court has granted certiorari to consider the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA) in *City of Boerne* v. *Flores*, No. 95-2074. Two of the questions presented in *Flores*—whether RFRA is a valid exercise of Congress's power under the Fourteenth Amendment and whether RFRA violates the separation of powers doctrine—are also presented in this case. *Flores* presents as well two other questions—regarding the constitutionality of RFRA under the Tenth Amendment and the Establishment Clause—that petitioners do not present in this case. See Pet. 4 n.1. The Court's decision in *Flores* is thus likely to resolve the issues in this case. Therefore, this case should be

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[1] At the Seventh Circuit's direction, the parties filed supplemental briefs discussing the possible bearing on the case of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §101(a), Tit. VIII, 110 Stat. 1321-66 (to be codified at 18 U.S.C. 3626). The parties agreed, and the Seventh Circuit decided, that any questions about the impact of this new law on the case should be addressed in the first instance by the district court on a motion to modify the injunction. Pet. App. A10.

held and disposed of as appropriate in light of the Court's decision in *Flores*.

CONCLUSION

The petition in this case should be held pending the Court's decision in *City of Boerne* v. *Flores*, No. 95-2074, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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